No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS
RETAILERS ASSOCIATION,
Petitioner,

v.

CLAYTON BYRD, Executive Director of the
Tennessee Alcoholic Beverage Commission, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF WINE AND SPIRITS WHOLESALERS OF TENNESSEE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Wine and Spirit Wholesalers of Tennessee (WSWT) is a non-profit trade association composed of businesses and individuals involved in the distribution and wholesale marketing of wine and distilled spirits within the State of Tennessee.[1] The membership of the WSWT have businesses located across the State of Tennessee and include publicly traded companies, private, multi-state operations, and family-owned businesses. All of the members of the WSWT are active participants in their businesses and are involved in the safe and legal distribution of wine and spirits within the State of Tennessee. The WSWT's current board of directors, the Chairman of the Board, and the President of the WSWT, Tom Hensley, have directly authorized Henry E. Hildebrand, III, General Counsel for the WSWT, to prepare and submit this *amicus curiae* brief on behalf of the WSWT.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored the brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made any such monetary contribution.

SUMMARY OF ARGUMENT

A. The Dormant Commerce Clause is a court created doctrine which should not be used to undo a valid state regulation.

The Dormant Commerce Clause is an inferred but unwritten doctrine that courts have drawn from Article 1, Section 8 of the Constitution. Congress has been conferred specific authority to regulate interstate commerce in this section. When Congress specifically and expressly acts in the realm of interstate commerce, such action preempts state legislation. Where Congress does not act, courts infer that the Constitution prohibits states from enacting any legislation, irrespective of whether that legislation contravenes a Congressional mandate, if in the view of the Court, the effect of that state legislation impacts or places a burden upon interstate commerce.

B. If the Dormant Commerce Clause retains any validity, it should not invalidate statutes and rules regulating alcohol.

Historically, this Court has found an infringement of the Dormant Commerce Clause, even though there is no express statement of preemption in a variety of areas. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761 (1945) [the maximum length of a train]; *Bibb v. Navajo Freightlines, Inc.*, 359 U.S. 520 (1959) [the proper shape and size of mudguards used in trucking]; *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) [the appropriate size of crates for the transport and delivery of cantaloupes]; *Hughes v. Oklahoma*, 441 U.S. 322 (1979) [the transportation of minnows procured in Oklahoma]; *Kassel v. Consolidated Freightways*

Corporation of Delaware, 450 U.S. 662 (1981) [the use of double bottom trucks on the highways of Iowa greater than 60 feet]. None of this preemption should be applied to the regulation of alcohol sales.

C. Even if the Dormant Commerce Clause is applicable, in a limited way, to the sale and distribution of alcohol within a state, a statute governing the residency of an applicant is a core issue of the Twenty-First Amendment and is not rendered invalid.

Tennessee law has long preserved local control over how and who may distribute alcoholic beverages. This local control has included limiting the residence and conduct of license owners as well as licensees. Tennessee law prohibits the issuance of a retail package store license to any individual "who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the Commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years."[2] The Alcoholic Beverage Commission may issue a retail license to a corporation so long as no officer, director, or stockholder is precluded from holding a license due to the residency of the officer, manager or stockholder.[3] Tennessee law similarly requires the applicant for a wholesale license to either be "individuals who are

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[2] See Tenn. Code Ann. § 57-3-204(b)(2).

[3] See Tenn. Code Ann. § 57-3-204(b)(3)(A), (B).

citizens of [the] state [of Tennessee] and either have been for at least the two (2) years next preceding citizens of [the] state [of Tennessee] or have been citizens of [the] state [of Tennessee] at any time for at least fifteen (15) consecutive years."[4]

Tennessee would grant wholesale licenses to corporations as long as the stockholders of such corporations holding a wholesale license to either be residents of the state for five (5) years or have, at any time, been a resident for at least fifteen (15) years.[5] Tennessee law allows the stockholders of a corporation holding a wholesale license to be nonresidents if the wholesale license has been held by the corporation for a least twenty-five (25) years.[6]

Tennessee's involvement in identifying all of the owners of a retail permit is specifically designed to permit the local citizenry to evaluate whether the right to distribute alcoholic beverages should be granted to an applicant. It is axiomatic that for the citizenry to be knowing participants in the process, they must know the applicants.[7]

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[4] Tenn. Code Ann. § 57-3-203-(b)(1).

[5] Tenn. Code Ann. § 57-3-203-(f)(1)(A).

[6] Tenn. Code Ann. § 57-3-203(g).

[7] As originally enacted, Tenn. Code Ann. § 57-3-204 [then codified as § 6648.7, Michie's Code of 1934] required a local official to state that the applicant is a person of good moral character "and is personally known to the official signing the certificate..." See *City of Chattanooga v. Tennessee Alcoholic Beverage Commission*, 525 SW.2d 470 (Tenn. 1975). Although this statute was subsequently

ARGUMENT

I. The Dormant Commerce Clause does not invalidate the durational residency provisions of Tennessee State Law.

Prior to the enactment and the national adoption of prohibition, Congress sought to confer the right to regulate the sale and distribution of alcoholic beverages to the various states. The Court held that alcohol was an article of commerce and a state statute which prohibited sales of alcohol within its borders could not be enforced against alcohol shipped from another state[8] due to the Commerce Clause.

In order to enable states to govern the sale and distribution of alcohol within their borders, Congress enacted the Wilson Act[9] and the Webb-Kenyon Act[10]. When these acts failed to give states the power to regulate the sale and distribution of alcohol, the Constitution was twice amended, first to absolutely prohibit the sale and distribution of alcohol and then to confer regulatory authority to the states. The provisions of Section 2 of the Twenty-First Amendment

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modified to make the determination more objective, the statute and its progeny establish that the character of the owners of the licensee were subject to review and citizen involvement. This involvement is as much a part of the regulation of the sale of alcoholic beverages as distribution and licensing, matters that are clearly within the purview of the states.

[8] *Leisy v. Hardin*, 135 U.S. 100, 105 S. Ct. 681, 34 L.Ed. 128 (1890).

[9] 27 U.S.C. § 121

[10] 27 U.S.C. § 122

were clearly designed to give effect to the Congressional effort to make the Webb-Kenyon Act applicable at a constitutional level. States were given the power to regulate the sale and distribution of alcohol within their boundaries, unfettered by the restrictions of the Commerce Clause, particularly the Dormant Commerce Clause.

Where Congress fails to exercise its authority, however, the residual authority is either retained for the federal control (the Dormant Commerce Clause) or flows back to the states as part of their Tenth Amendment rights. When Congress did speak on the issues related to the distribution of alcohol, it opted for the latter course; it sought to confer regulatory authority to the states. When the Court struck down the ability of Congress to confer its authority to the states,[11] the Constitution was amended with the Eighteenth Amendment, making the importation, distribution and sale of alcohol constitutionally prohibited.

Here, therefore, it is no longer Congress that has spoken, it is the Constitution itself. Section 2 of the Twenty-First Amendment provides that "[t]he transportation or importation into any state, territory or possession of the United States for delivery or use thereon of intoxicating liquors in violation of the laws thereof, is hereby prohibited." With there being an express delegation of authority to regulate the sale of alcohol within a state, the Dormant Commerce Clause should be inapplicable.

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[11] See, e.g. *Scott v. Donald*, 165 U.S. 58, 17 S. Ct. 265, 41 L.Ed. 632 (1897).

In 1933, upon enactment of the Twenty-First Amendment, the issue of whether the second section removed from Commerce Clause scrutiny state laws governing the importation and sale of alcohol was presented. Initially, the Court held that the amendment was dispositive on the supremacy of state regulation:

> "The words of Section 2 of the Twenty-First Amendment are apt to confer upon the state the power to forbit all importations which do not comply with the conditions which it prescribes."[12]

As the concurring opinion of Judge Hamilton in *Lebamoff Enterprises v. Huskey*, 666 F.3d 455, 463 (7th Cir. 2012) put it: "[T]he language in Section 2 of the Twenty-First Amendment has the unique effect of elevating the covered state laws and regulations to the status of federal constitutional law."

This position has gradually been curtailed by a number of cases which pitted state regulations governing alcohol and the provisions of federal law. For example, The Sherman Act was not protected from attack by the second section of the Twenty-First Amendment.[13]

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[12] *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59 (1936).

[13] *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001); *United States v. Frankfort Distillers*, 324 U.S. 293 (1945); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 837. 63 L. Ed. 2d 233 (1980).

When squarely confronted with the trumping of the states' power preserved in Section 2 of the Twenty-First Amendment, in 1964, this Court struck down a number of state laws. *Hostetter v. Idlewild Bon Voyage Liquor Mart Corp.*[14] and *Dept. of Revenue v. Jones B. Beam Distilling Co.*[15] The Court found nothing in the Twenty-First Amendment that would read the constitutional amendment so broadly.

> "There can surely be no doubt . . . of Kentucky's plenary power to regulate and control . . . the distribution, use or consumption of intoxicants within her territory after they have been imported."[16]

But that apparently unfettered authority was limited.

There can be little doubt that, starting in 1964, the Webb-Kenyon authority found in Section 2 of the Twenty-First Amendment was gradually obliterated. The express provisions of a constitutional amendment were supplanted by Commerce Clause considerations, even where those Commerce Clause concerns had not been the subject of any expression by Congress.

This view of the power of the Dormant Commerce Clause has been embraced by several courts, reaching its zenith in *Granholm v. Heald*.[17]

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[14] 377 U.S. 324, 84 S. Ct. 1293, 12 L. Ed. 2d 38 (1964).

[15] 377 U.S. 341, 84 S. Ct. 1247. 12 L. Ed. 2d 362 (1964).

[16] Id at 346, 1250.

[17] 544 U.S. 460, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005).

The Dormant Commerce Clause is, however, a court created extrapolation from Article 1 Section 8, holding that where Congress says nothing, the right of Congress to regulate interstate commerce trumps the ability of any state to regulate it. Where Congress is not only silent, but that authority has been constitutionally conferred to the states, the states should have that control.

If, however, this Court decides that the Dormant Commerce Clause still has vitality in matters relating to alcoholic beverages, such authority should be limited, recognizing that the regulation by the states is given specific approval in the Twenty-First Amendment.[18] In *Granholm v. Heald*, 544 U.S. 460, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005), the Court acknowledged that states are invested with substantial authority to regulate the sale, importation and distribution of alcoholic beverages. The Court has observed that states' adoption of the three-tier system is "unquestionably legitimate."[19] If so, the regulation of how alcohol is sold – the questions of who, how, when, where alcohol can be sold – is part of that three-tier system and is valid.

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[18] See *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010) at 813.

[19] *North Dakota v. United States*, 495 U.S. 423, 110 S. Ct. 1986, 109 L. Ed. 2d 420 (1990).

II. If the Dormant Commerce Clause is applicable to the distribution of alcohol, notwithstanding the prohibition of Section 2 of the Twenty-First Amendment, the application of a residency requirement remains within the purview of state authority.

In cases which deal with the application of the Dormant Commerce Clause to the sale and distribution of alcoholic beverages, courts have held that state laws cannot discriminate against out of state liquor products or out of state liquor producers. Residency of its retailers or wholesalers does not deal with out of state products or producers. As noted by the Eighth Circuit, "It is beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause . . . then we think States have flexibility to define the requisite degree of 'in-state' presence to include the in-state residence of wholesalers directors' and officers' and a super-majority of their shareholders."[20]

Although the *Southern Wine & Spirits of America, Inc.* case dealt with the residency of wholesalers, its reasoning is clearly applicable to retailers and other licensees.

Here, the state holds a legitimate interest in the residency of the owners of a licensee. Tennessee, like many states, approaches its regulation of the importation and sale of alcoholic beverages as an inherently local matter. Initially, the sale of wine and

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[20] *Southern Wine & Spirits of America, Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 810 (8th Cir. 2013).

distilled spirits may only be affected in jurisdictions where the local voters have approved such sales.[21] It is a matter of significant importance that the determination of whether to sell alcohol is made by each separate community by a vote of the people.

The matter of local involvement is not limited to the question of whether or not such sales would be authorized in a given jurisdiction. Local communities are given deference as to the character and background of the actual owners of the proposed licensees, verifying the criminal background of the owners that are actually in charge of the retail license.[22] Every owner of a new application for a retail license is disclosed to the public on the TABC website and included on the TABC agenda.[23]

Tennessee requires local governments to provide a certificate of compliance to the Tennessee Alcoholic

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[21] Local option election for package stores is governed by Tenn. Code Ann. §§ 57-3-102 and 57-3-106. Local option election for liquor-by-the-drink is governed by Tenn. Code Ann. § 57-4-103. Local option election for sales of wine in food stores is governed by Tenn. Code Ann. § 57-3-801.

[22] Some out-of-state owners may argue that as long as the manager of the store is a local resident, local control is maintained. See *Byrd v. Tennessee Wine and Spirits Retailers Association*, 883 F.3d 608 (6th Cir. 2018) at 625 through 626. This argument ignores the fact that it is the character, background and trustworthiness of the owners that will control the operations of the retail establishment.

[23] See, October 2018 Meeting Minutes available at: e.g., https://www.tn.gov/content/dam/tn/abc-documents/abc-documents/Oct2018_CM_MMRCM_MeetingMinutes.pdf

Beverage Commission.[24] The regulations of the Alcoholic Beverage Commission also require the public disclosure of the owners of a package store applicant, giving local communities the opportunity to be heard on the application.[25] The assumption of this regulation is, of course, that the members of the local community are in the best position to evaluate the character and good faith of the individuals that own the licensee. Superficially it may seem appropriate that limiting a store manager's residence could give the local community a similar opportunity to participate, but nothing in the regulations of the Alcoholic Beverage Commission or the state statutes provide a mechanism for community involvement in the licensing of a store manager. The lower courts assumption that the residency of a manager will suffice is a cynical mechanism by which citizens would be deprived of the opportunity to participate in the process.

This court has not had the opportunity to evaluate the constitutionality of state laws governing the residency of the businesses involved in the direct sale of alcohol to consumers. Underage drinking, excessive consumption, improper trade practices, and taxation are all matters that are core concerns of the Twenty-First Amendment. Residency facilitates the enforcement of these core concerns and is part of the "clearly valid" three-tier system.

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[24] Tenn. Code Ann. § 57-3-208(b).

[25] See Tennessee Regulation 0100-03-.09. "Interested persons may personally or through counsel submit their views [on a retail application] in writing by the hearing date to be scheduled by the TABC."

Further, it cannot be ignored that agents – employees of the State of Tennessee – are required to investigate the operations of a licensee which could include examining the books and records maintained by its ownership. The state, by requiring owners of licensees to satisfy a two (2) year durational residency requirement, facilitates the ability of the TABC agent's task to satisfy this scrutiny. Surely the Dormant Commerce Clause does not require agents investigating owners to travel across country to conduct an initial investigation of a retail applicant.

Tennessee recognizes that the owner of an entity that owns a retail license may actually operate the licensed premises. See Tennessee Regulation 0100-03-.15(6). The Alcoholic Beverage Commission enforces the limit on the number of retail package store licenses that can be issued by the state. The interest in a package store license involves any interest including ownership, minority ownership, or control.[26] State law looks deeper than the managers of the licensee. State law is concerned with all interests in a package store licensee.

CONCLUSION

The Dormant Commerce Clause is a court created rule which does not find its source in the Constitution itself. As Justice Thomas noted in *Granholm*, "States require liquor to be shipped through in-state wholesalers because it is easier to regulate in-state

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[26] See TABC Frequently Asked Questions available at www.tn.gov/abc/publicinformation-and-forms/frequently-asked-questions.html.

wholesalers and retailers. State officials can better enforce their regulations by inspecting the premises and attaching the property of in-state entities. . ." 544 U.S. at 517, 125 S. Ct. at 1921. Where owners are subject to the regulations of the Alcoholic Beverage Commission, similarly, requiring those owners to be residents of the state serves a legitimate state purpose. "Presence ensures accountability."[27]

To the extent that there is a Dormant Commerce Clause and it does apply to the sale and importation of alcohol, contrary to the express provisions of Section 2 of the Twenty-first Amendment, the state law is an integral part of the state's three-tier system, giving to the state the authority to regulate the licenses and entities that are directly authorized to sell and distribute alcohol, deference must be given to the state legislature rather than through a judicially created weighing involving minimal evidence. The WSWT supports the position of the Tennessee Wine and Spirits Retailers Association and the Attorney General of the State of Tennessee[28] in its argument that the durational residency requirement imposed by Tennessee law are a valid exercise of the core regulatory powers of Tennessee. The Sixth Circuit's holding to the contrary should be reversed.

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[27] *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004). Reversed by *Granholm v. Heald*, 544 U.S. 460, 517, 125 S. Ct. 1885, 1921 (2005).

[28] See docket entry for November 13, 2018 – Letter of Clayton Byrd, Executive Director of the Tennessee Alcoholic Beverage Commission submitted, signed by the Tennessee Attorney General.

Respectfully submitted,

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